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No. 79-986

In the Supreme Court of the United States

OCTOBER TERM, 1979

EDWIN MORROW CURRIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 609 F.2d 1193.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1979. The petition for a writ of certiorari was filed on December 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence from which the jury could conclude beyond a reasonable doubt that petitioner acted under color of law within the meaning of 18 U.S.C. 242.

2. Whether the court of appeals correctly upheld the district court's exercise of discretion in denying petitioner's motion for a new trial on grounds of juror prejudice.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of willfully depriving Russell Charles Landers of his civil rights while acting under color of law, in violation of 18 U.S.C. 242. Petitioner was sentenced to one year's imprisonment. The court of appeals affirmed (Pet. App. A).

1. The evidence at trial established that on April 23, 1977, Russell Charles Landers was staying at the home of a friend, Ronald McGarrity, who lived two doors down from petitioner in a townhouse apartment complex in Memphis, Tennessee (A. 5, 8).[1] Each apartment was assigned two parking spaces and, in addition, there were visitors' parking spaces provided in the lot (A. 48-49, 147). When Landers returned to the complex between 7:30 and 8:00 p.m., both of McGarrity's parking spaces were occupied. Landers

[1] "A." refers to the joint appendix filed in the court of appeals.

parked his car in a space assigned to petitioner, intending to ask McGarrity where he should park for the evening (A. 11). As Landers left his car, petitioner called out from an upstairs window that the car was in a private parking space and would have to be moved (A. 11-12). Landers stated that he was going to ask McGarrity where he should park. When Landers started to walk in the direction of McGarrity's apartment, petitioner called out in an angry tone that he was a policeman, that he had company coming, and that Landers would have to move his car (A. 12).

Petitioner then came out of his apartment at a fast pace wearing blue jeans and a T-shirt, with a gun strapped in a shoulder holster under his left armpit and a billy club in his hand (A. 13-14, 41, 96). Petitioner approached Landers and stated again that he was a policeman (A. 14). Before Landers had time to explain his intentions about trying to move the car, petitioner hit him hard in the head with his billy club, and while Landers was reeling from the effects of the blow and bleeding profusely, petitioner pushed Landers around in the parking lot area and drew his gun (A. 14-15). An eyewitness, Yvonne Pleasants, hollered out that she was going to call the police, but petitioner stated he was a police officer and would handle the situation (A. 46, 99). Ms. Pleasants called the police anyway because "Mr. Landers hadn't done anything to deserve being hit on

the head and a gun being pulled on him * * *" (A. 47).[2]

Petitioner left Landers in the parking lot, went to his apartment and returned with a set of handcuffs, which he used to cuff Landers with his hands behind his back (A. 16, 167). Petitioner also called the police and, when a squad car arrived, he informed the responding officers that Landers was under arrest (A. 109-110, 168). The arresting officer testified that he took Landers into custody because petitioner, though off duty, had the power of arrest pursuant to a Memphis Police Department policy and had invoked that power in turning Landers over to him (A. 111).[3]

2. Following the jury's verdict, but before sentencing, petitioner moved for a new trial on the ground of juror prejudice. After an evidentiary hearing the district court denied the motion.

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[2] In addition to Ms. Pleasants (A. 42-46), two other eyewitnesses confirmed that petitioner's assault of Landers with the night stick was unprovoked and was preceded by petitioner's assertion of his authority as a police officer (A. 67-72, 92-99).

[3] Disciplinary Rule Number 120, entitled Off Duty Responsibility, provides (A. 58-59):

> Members are always subject to orders from a supervisory officer and to calls for assistance from private persons. Being technically off duty does not relieve them from the responsibility of taking proper police action in any matter coming to their attention. When there is no urgent need for police action, they may request the dispatcher to turn the matter over to officers on duty, but they shall take such interim action as may be required prior to the arrival of the dispatched officers.

The facts relating to petitioner's motion for a new trial are as follows. During voir dire, the court had asked all prospective jurors whether they or any close members of their families had "ever been involved in a criminal case either as a witness or a defendant" (A. 189). The jurors were also asked as a group whether any of them had ever had any negative experience with law enforcement, such as a traffic citation they considered unwarranted or other similar experience that caused them to feel resentment (A. 189a-189b). Although two jurors, Marshall Johns, Jr. and Joe R. Hales, had arrest records for minor offenses (A. 193), and another juror, Joe W. Brown, had pleaded guilty to two counts of rape in 1963 (A. 194-195, 200), none of the three responded to the court's voir dire questions on this subject (A. 189b). After examining all three jurors at the post-trial hearing, the court concluded that their lack of response during voir dire was the result of their having misunderstood the nature and purpose of the questions, and that they did not intentionally misrepresent their backgrounds or harbor any actual bias or prejudice against the petitioner (A. 234-236).

ARGUMENT

1. Petitioner contends (Pet. 8-11) that there was insufficient evidence in the record from which the jury could have concluded that he was acting under color of law when he committed the assault on Landers. The question whether a defendant charged with

violating 18 U.S.C. 242 has acted under color of law is one for resolution by the jury under proper instructions. *Williams* v. *United States*, 341 U.S. 97, 99 (1951). Petitioner does not here contest the conclusion of the court of appeals (Pet. App. A-1) that the jury was properly instructed, and this fact-bound sufficiency question does not warrant further review.

Contrary to petitioner's contention (Pet. 9), his conviction does not rest upon the mere fact that he was employed as a police officer. Rather, the record demonstrates that petitioner's entire course of conduct was undertaken in reliance on his authority as a state official. Petitioner, although off duty and out of uniform, was specifically authorized by police department regulations to make an arrest. When he discovered that Landers was parked in one of his parking spaces, he informed Landers that he was a police officer and requested that Landers move his car. He then pulled on his shoulder holster containing the Memphis Police Department's standard issue service weapon, picked up his regulation issue nightstick, placed it in his back pocket, and went outside to the parking lot. There he approached Landers, repeated that he was a police officer and requested that Landers move his car. Without provocation, petitioner then struck Landers across the forehead with his nightstick, handcuffed Landers with his police department issue handcuffs, and placed him under arrest, turning him over to the custody of an on-duty officer who responded to petitioner's call for assist-

ance. In short, petitioner purported to act in his official capacity when he ordered Landers to move his car; the ensuing assault was the direct result of petitioner's misuse of power that he possessed by virtue of his position as a police officer. See *United States* v. *Classic*, 313 U.S. 299, 326 (1941). Under these circumstances, the jury was entitled to find that petitioner was acting under color of law at the time he struck Landers.

That petitioner was off duty and at his residence at the time of the assault does not show, as petitioner argues (Pet. 8, 10), that he was acting only within the ambit of his personal pursuit. Interpreting the "color of law" requirement under 42 U.S.C. 1983 [4] the court in *Stengel* v. *Belcher*, 522 F.2d 438, 441 (6th Cir. 1975), cert. dismissed as improvidently granted, 429 U.S. 118 (1976), concluded that:

> [t]he fact that a police officer is on or off duty, or in or out of uniform is not controlling. "It is the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law." *Johnson* v. *Hackett*, 284 F.Supp. 933, 937 (E.D. Pa. 1968).

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[4] The phrase "color of law" in 42 U.S.C. 1983 is to be construed identically with the same phrase in 18 U.S.C. 242. See *Monroe* v. *Pape*, 365 U.S. 167, 185 (1961).

The court of appeals simply applied these settled principles to the facts of this case in ruling that the jury's verdict was supported by sufficient evidence.[5]

2. There is likewise no merit to petitioner's contention (Pet. 11-13) that his conviction resulted from juror prejudice. A party attacking the integrity of a jury's decision on grounds of juror prejudice bears the burden of persuasion that a juror was not impartial "not as a matter of speculation but as a demonstrable reality." *United States ex rel. Stickler* v. *Tehan*, 365 F.2d 199, 201 (6th Cir. 1966), cert. denied, 386 U.S. 992 (1967), quoting *United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 462 (1956). Where the evidence that comes to light after trial shows neither a deliberate misrepresentation by the juror nor actual bias or prejudice, the decision whether to grant a new trial rests within the sound discretion of the district court. See *United States* v. *Mulligan*, 573 F.2d 775, 777-778 (2d Cir.), cert. denied, 439 U.S. 827 (1978); *Turner* v. *United States*, 416 F.2d 815, 817 (D.C. Cir. 1969); *Jackson* v. *United States*, 408 F.2d 306, 309 (9th Cir. 1969). Here, the district court found that the jurors' failure to respond to the voir dire questions was the result of innocent misunderstanding, and that the jurors were not prejudiced against petitioner. These findings were based on the court's assessment of the jurors' demeanor when they testified at the post-trial hearing. The court of appeals found no abuse of discretion by the district court here, and petitioner has shown no reason for this Court to deviate from its settled practice not to disturb a fact finding concurred in by two lower courts. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636 (1967); *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948).

The fact that juror Brown, as a convicted felon, would have been statutorily disqualified from serving on the jury (see 28 U.S.C. 1865(b)(5)) does not automatically require a new trial in the absence of a showing of bias or prejudice. See *United States* v.

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[5] There is no merit to petitioner's assertion (Pet. 8) that the decision below conflicts with several cases decided by this Court. In none of the cases on which petitioner relies did this Court hold that an official had not acted under color of state law. That certain conduct described in those cases was held to be within the scope of 18 U.S.C. 242 does not support petitioner's claim that his actions were not covered by the statute.

The other cases cited by petitioner (Pet. 9) are also inapposite. *Duzynski* v. *Nosal*, 324 F.2d 924 (7th Cir. 1963), and *Byrne* v. *Kysar*, 347 F.2d 734 (7th Cir. 1965), involved persons acting purely in their private capacities, and not, as here, a state official who purported to use his authority to deprive a person of his civil rights. In *Cole* v. *Smith*, 344 F.2d 721 (8th Cir. 1965), the court held that because internal prison discipline was a matter within the discretion of prison authorities, actions by state prison guards in allegedly assaulting prisoners were not shown to have violated the plaintiff's constitutional rights. In *Watkins* v. *Oaklawn Jockey Club*, 183 F.2d 440 (8th Cir. 1950) and *Johnson* v. *Hackett*, *supra*, police officers did not invoke their official authority, draw their guns, or use excessive force, as petitioner did here. Finally in *Nugent* v. *Sheppard*, 318 F.Supp. 314 (N.D. Ind. 1970), the court concluded that the police officer *was* acting under color of state law when he assaulted the plaintiff; the result in *Nugent* is thus not inconsistent with the decision of the court of appeals in this case.

Crockett, 514 F.2d 64, 69 (5th Cir. 1975); *United States* v. *Silverman*, 449 F.2d 1341, 1344 (2d Cir. 1971), cert. denied, 405 U.S. 918 (1972); *Ford* v. *United States*, 201 F.2d 300 (5th Cir. 1953). Similarly, it is insufficient for petitioner to show that defense counsel might have exercised a peremptory challenge to strike any of these jurors. See, *e.g.*, *United States* v. *Mulligan*, *supra*, 573 F.2d at 777-778; *Williams* v. *United States*, 418 F.2d 372, 377 (10th Cir. 1969).

Nor is there any basis for petitioner's suggestion that the jurors here should have been determined to be prejudiced as a matter of law. The cases cited by petitioner in support of this theory (Pet. 12-13) involved situations in which the appellate court held that the facts known to the trial court at the time of trial showed actual prejudice, *United States* v. *Chapman*, 158 F.2d 417 (10th Cir. 1946) (juror had previously testified as an expert witness against the government in a condemnation suit growing out of the same condemnation project); *United States ex rel. Fletcher* v. *Cavell*, 287 F.2d 792 (3d Cir.), cert. denied, 366 U.S. 944 (1961) (foreman of the jury was the son-in-law of a witness who testified for the prosecution), or are otherwise inapposite.[6]

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[6] *Government of the Virgin Islands* v. *Bodle*, 427 F.2d 532 (3d Cir. 1970) and *Photostat Corp.* v. *Ball*, 338 F.2d 783 (10th Cir. 1964), also cited by petitioner, are distinguishable from the present case. In *Bodle*, at a trial for rape, a juror failed to disclose that his sister had been a victim of a forcible rape and murder some years earlier, while in *Photostat*, in a personal injuries case arising out of an automobile accident, several jurors had failed to disclose that they had been involved in similar accidents that resulted in damages claims for which they had been paid. Here, however, there was no evidence that any of the jurors or their relatives had been assaulted, or felt that they had been treated unfairly, by police officers. The mere fact that they had prior brushes with the law did not suggest that they were likely to be prejudiced against petitioner's cause merely because he was a policeman.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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